

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MENACHEM BINYAMIN ZIVOTOFSKY, BY :

4 HIS PARENTS AND GUARDIANS, ARI Z. :

5 AND NAOMI SIEGMAN ZIVOTOFSKY, :

6 Petitioner : No. 10-699

7 v. :

8 HILLARY RODHAM CLINTON, SECRETARY :

9 OF STATE :

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11 Washington, D.C.

12 Monday, November 7, 2011

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:02 a.m.

17 APPEARANCES:

18 NATHAN LEWIN, ESQ., Washington, D.C.; on behalf of
19 Petitioner.

20 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-699, Zivotofsky v.
5 Clinton.

6 Mr. Lewin.

7 ORAL ARGUMENT OF NATHAN LEWIN

8 ON BEHALF OF THE PETITIONER

9 MR. LEWIN: Mr. -- Mr. Chief Justice, and
10 may it please the Court:

11 In its recent decisions in *Medellin v. Texas*
12 and in *Hamdan v. Rumsfeld*, this Court approved and
13 applied the familiar tripartite scheme that Justice
14 Jackson articulated in the steel seizure case. When the
15 President takes measures incompatible with the express
16 or implied will of Congress his power is at its lowest
17 ebb. In that instance, said Justice Jackson, his claim
18 to a power at once so conclusive and preclusive must be
19 scrutinized with caution to preserve the equilibrium
20 established by our constitutional system.

21 JUSTICE KAGAN: Well, Mr. Lewin, what power
22 is Congress exercising here?

23 MR. LEWIN: Justice Kagan, Congress has
24 exercised its power over passport, the issuance of
25 passports under the immigration, naturalization and

1 foreign commerce powers that Congress has. It has
2 enacted passport legislation back in 1856, in 1926. It
3 can control what the contents of a passport ought to be,
4 what its duration may be --

5 JUSTICE ALITO: What --

6 MR. LEWIN: -- how the application is to be
7 made. And we say this is an identification --

8 JUSTICE ALITO: Do you --

9 MR. LEWIN: -- portion of the passport.

10 JUSTICE ALITO: Do you think it's relevant
11 that the title of section 214 is "United States Policy
12 With Respect to Jerusalem as the Capital of Israel"?

13 MR. LEWIN: Well, we think -- and we have
14 cited I guess in footnote 2 of our brief a number of
15 recent cases of this Court that have said that you take
16 each statutory provision independently and determine its
17 constitutionality. True, Congress has a broader view
18 with regard to the policy of Jerusalem being part of
19 Israel than the Executive Branch has had since 1948.
20 However, that purpose is not determinative of what the
21 constitutionality is of subsection (d). Moreover --

22 JUSTICE GINSBURG: But you say, Mr. Lewin,
23 that -- you are not claiming exclusivity in Congress.
24 You say foreign relations is a shared power. So if it
25 is a shared power, why does Congress trump the

1 executive?

2 MR. LEWIN: Because -- precisely because
3 under the standard of the steel seizure case and this
4 tripartite scheme, if Congress determines that what the
5 President has done -- and this is a statute which is
6 really very narrow and deals with past conduct by the
7 Executive Branch, as it were. It does not hobble the
8 President in terms of future foreign policy.

9 JUSTICE KENNEDY: Well, under your -- under
10 your theory, and this is just a following on Justice
11 Ginsburg's question, I think. Under your theory what
12 foreign relations determinations are for the President
13 alone to make?

14 MR. LEWIN: Foreign relations determinations
15 are not left to the President alone.

16 JUSTICE KENNEDY: Are there any foreign
17 relations determinations that are for the President
18 alone to make under your theory of the case?

19 MR. LEWIN: Yes, Justice Kennedy.

20 JUSTICE KENNEDY: And those are?

21 MR. LEWIN: Those are diplomatic
22 communications. In other, it's the President who
23 makes --

24 JUSTICE KENNEDY: In other words, who gets
25 the telegram?

1 MR. LEWIN: Well, who issues the
2 communication to the foreign government, who determines;
3 there are certain things that the President alone does
4 because he's the one who implements foreign policy.

5 JUSTICE KENNEDY: Is there any treatise
6 writer or decision of this Court that supports such a
7 narrow, crabbed interpretation of the President's
8 foreign affairs power?

9 MR. LEWIN: Well, with all respect,
10 Justice Kennedy, we don't think it's crabbed. We think
11 that that is exactly what Justice Jackson was referring
12 to, and that's what this Court has said in the Medellin
13 case and -- and in Hamdan as well, that if --

14 JUSTICE KENNEDY: Of course --

15 MR. LEWIN -- Congress does not authorize --

16 JUSTICE KENNEDY: -- the Jackson tripartite
17 division, this famous division he had, I think assumes
18 the validity of the congressional statute at the first
19 step of inquiry. And here that's the whole question.

20 MR. LEWIN: I don't know whether it's
21 limited to the assumption with regard to the
22 congressional statute. If Congress says, as it did in
23 this case, we disapprove of the State Department's view
24 that passports should not contain the -- the
25 identification of Israel for people who were born in

1 Jerusalem, that is Congress disapproving of what the
2 State Department and past State Department --

3 JUSTICE SOTOMAYOR: Mr. --

4 MR. LEWIN: -- policy has been.

5 JUSTICE SOTOMAYOR: Mr. Lewin, you were cut
6 off earlier when you were saying this reading doesn't
7 hobble the President in the future.

8 It says anybody born in -- in Jerusalem can
9 have Israel listed, correct? What happens if there is a
10 peace accord tomorrow, and Israel gives up any claim to
11 sovereignty over Jerusalem? Is the President free to
12 stop listing Israel on the passport?

13 MR. LEWIN: If --

14 JUSTICE SOTOMAYOR: Or does he have to wait
15 for Congress to change the law?

16 MR. LEWIN: I think he does have to wait for
17 Congress to change the law.

18 JUSTICE SOTOMAYOR: So you are hobbling the
19 President with respect to situations that occur
20 frequently --

21 MR. LEWIN: Well --

22 JUSTICE SOTOMAYOR: -- as happened in Egypt,
23 sometimes overnight.

24 MR. LEWIN: No, but it may in some way, in a
25 very remote possible way -- I mean, I think under those

1 circumstances, if there were a peace treaty and if
2 Jerusalem were handed over to a Palestinian state, I
3 think Congress would repeal the statute.

4 That's the point. Congress has the power,
5 has the authority under the Constitution to enact laws,
6 and it is Congress that makes the decision even with
7 regard to foreign policy issues.

8 JUSTICE SOTOMAYOR: The Constitution
9 requires ambassadors to be appointed with the consent of
10 the Senate. It gives Congress the power of the purse.
11 So why don't -- why isn't the better view that we let
12 Congress express its approval and disapproval in the
13 mechanism set up by the Constitution to do so? Meaning,
14 if the President recognizes a country that Congress
15 doesn't want it to recognize, it can withhold approval
16 of an ambassador, it could refuse to fund the embassy.
17 It could do many other things.

18 But what entitles Congress to trench on a
19 presidential power that has been exercised virtually
20 since the beginning of the country?

21 MR. LEWIN: With all respect, Justice
22 Sotomayor, I think history demonstrates that that's
23 simply not true, that in fact Congress has had equal,
24 quote, "recognition power," if in fact that's a power
25 rather than a ceremonial duty. We have in our reply

1 brief gone through the fact that from Presidents Monroe,
2 Jackson, Taylor, Lincoln, and even at the time of
3 President McKinley, Congress said: We have the
4 authority to be recognized -- to recognize.

5 JUSTICE KAGAN: Mr. Lewin, this gets back to
6 the question of exactly what congressional power you are
7 basing your argument on. You started by saying you were
8 basing it on Congress's passport power, which is a
9 function of its control over immigration issues. Now
10 you are saying Congress has a co-equal recognition
11 power. Which is it, or is it both?

12 MR. LEWIN: No. It's in the alternative,
13 Justice Kagan; it is both. We submit first of all there
14 is no exclusive recognition power in the President, if
15 there is a recognition power, and we spell that out.

16 JUSTICE GINSBURG: Does that go the full
17 length of saying if Congress passed a law that says the
18 United States recognizes Jerusalem as the capital of
19 Israel and Jerusalem must be designated as the capital
20 of Israel in all official documents -- suppose that were
21 the law. I take it from everything you have argued your
22 position would be yes, Congress has that authority.

23 MR. LEWIN: We say Congress has that
24 authority. But I have to add, Justice Ginsburg, that
25 Congress has been very careful in the past and we

1 believe it will be in the future to give the President
2 broad authority. To the extent that Congress has tried
3 to do that, Congress has consistently said that the
4 President can waive the moving of the embassy to
5 Jerusalem, because Congress recognizes -- this is one of
6 these very rare situations where Congress has said what
7 the President has done and what the Department of State
8 has done is simply wrong.

9 JUSTICE SCALIA: Mr. Lewin, you're -- it
10 seems to me you are not arguing for a co-equal
11 congressional power, you are arguing for a superior
12 congressional power. You are saying whatever Congress
13 says, the President has to comply with. Now, that's
14 quite different from saying that they both have
15 authority in the field. And if they both have authority
16 in the field and they are exercising it in different
17 fashions, I frankly would not be inclined to intervene.
18 I would let -- I would let them conduct the usual
19 inter-branch hand wrestling that goes on all the time,
20 which probably means that if Congress cares enough
21 Congress will win, because, as you say, it has an
22 innumerable number of clubs with which to beat the
23 executive.

24 But if -- if the power is a co-equal power
25 and they are both exercising it in a -- in a different

1 way, why don't we just -- just, you know, let them go at
2 it? Why is it any of our business which is the better
3 foreign policy position?

4 MR. LEWIN: We are not -- the Court is not
5 being asked to determine what is the better foreign
6 policy position. Congress has determined --

7 JUSTICE SCALIA: Congress is supreme, then?
8 That is your position. Not -- not that Congress has
9 co-equal authority with the executive, but Congress is
10 supreme?

11 MR. LEWIN: No, there is two aspects to
12 this, Justice Scalia. One is the recognition power. As
13 to the recognition power, if it exists, Congress has it
14 together with the President. But with regard to foreign
15 policy and with regard to the question of whether
16 Congress can trump the President, this is not a new
17 proposition. The Court determined it in the steel
18 seizure case. The Court more recently in -- in
19 approving Justice Jackson's tripartite scheme, approved
20 it in *Medellin v. Texas*.

21 CHIEF JUSTICE ROBERTS: Well, *Medellin*
22 involved a situation where the President's purported
23 exercise of authority changed domestic law, and not
24 simply domestic law, but domestic State law. That
25 seems to me to be quite a distinguishable circumstance.

1 MR. LEWIN: But what -- again, what Justice
2 Jackson said was that when there -- the two are
3 incompatible, then you look, the Court looks and
4 scrutinizes, "subjects to scrutiny" -- those words are
5 in Justice Jackson's standard -- scrutinizes what the
6 President has done.

7 And we submit in this case, if the Court
8 were to look at the answers to the interrogatories in
9 this case, what is the basis for the President's policy,
10 if one scrutinizes it, we say in our brief, it's -- we
11 call it trivial, because what happens is the Department
12 of State has said -- and again this is important in
13 terms of this statute -- all that happens with this
14 statute is that 50,000 American citizens have the same
15 passport as 100,000 other American citizens who were
16 born in Tel Aviv or Haifa. It just says "Israel"; it
17 doesn't say "Jerusalem, Israel"; it just says "Israel."
18 And the State Department says that's justified because
19 Arab countries or Palestinians may be upset if they
20 misperceive.

21 CHIEF JUSTICE ROBERTS: So you were
22 suggesting that the outcome of this if Congress said
23 Jerusalem is rea.

24 MR. LEWIN: I say it's a different case,
25 yes, absolutely. In this case what the -- the important

1 thing about this case and this statute is that it gives
2 the individual passport holder a choice.

3 CHIEF JUSTICE ROBERTS: Why is it -- why is
4 it a different case?

5 MR. LEWIN: It's a different case because if
6 it were to say "Jerusalem, Israel" there would be more
7 of an argument. Again, I'm not saying I would be here
8 acknowledging that that's impermissible. But it would
9 be more of an argument that it appears to be some
10 official approval of Jerusalem being in Israel.

11 CHIEF JUSTICE ROBERTS: So would there be --
12 there would be a greater concern -- the concern on the
13 part of the executive that there would be adverse
14 political reaction would have a greater degree of
15 credibility?

16 MR. LEWIN: Somewhat greater degree. Again
17 --

18 CHIEF JUSTICE ROBERTS: So we are supposed
19 to decide whether or not the executive is correct in
20 saying that it's a significant problem. And he says,
21 well, he says that, but we know foreign policy better;
22 we don't think it's going to be a big deal.

23 MR. LEWIN: No, I don't think the Court is
24 being asked to decide a question of foreign policy.
25 Congress has decided that saying "Israel" alone does not

1 present a foreign policy issue. Congress recognized
2 that with moving the embassy there might be a foreign
3 policy issue, so they said that the President can waive
4 that.

5 With regard to this provision, Congress has
6 said, no, there is not likely to be any foreign policy
7 harm. And all that the Court is being asked to do is
8 it's being asked to enforce the congressional
9 conclusion, which is, we submit, exactly what the third
10 level under Justice Jackson's test is: That if in fact
11 Congress decides that what the President has concluded
12 or the Executive Branch has concluded is wrong, it
13 may -- and it has the constitutional power to say --
14 with regard to foreign policy, we can exercise our
15 determination.

16 CHIEF JUSTICE ROBERTS: I don't see Justice
17 Jackson's analysis -- what he's saying, and I guess I
18 don't think it's as controlling as others might. He's
19 saying when there is a conflict it's a harder case.

20 MR. LEWIN: Yes.

21 CHIEF JUSTICE ROBERTS: When there's -- when
22 they agree it's an easy case. When you can't tell it's
23 sort of a middle case. I don't see how that is very
24 helpful in resolving the dispute before us.

25 MR. LEWIN: Well, because he says that when

1 it's in the third category the Court has an obligation
2 under those circumstances if it's going to keep the
3 equilibrium of the balance of powers, to look at what
4 the President's justification is.

5 The word "scrutiny" is in there. That's not
6 just a phrase that Justice Jackson has taken out of the
7 air. He says you are supposed to scrutinize it. And if
8 you scrutinize it in this case, there is nothing other
9 than the possibility that there would be a misperception
10 by Palestinians. That's what the State Department is
11 saying.

12 JUSTICE SCALIA: What -- what were we
13 scrutinizing in the steel seizure case?

14 MR. LEWIN: I think in the steel seizure
15 case the Court was scrutinizing whether, notwithstanding
16 the fact that Congress did not give the President the
17 power to seize steel mills, nonetheless whether there
18 could be some justification that, even in contrary to
19 Congress's wishes, the President would be able to
20 exercise that power.

21 JUSTICE SCALIA: And what presidential power
22 would have supported that, the war power?

23 MR. LEWIN: Possibly the claim that as
24 Commander in Chief in the time of the Korean War he
25 would be able --

1 JUSTICE SCALIA: Right. He was claiming
2 that the Korean War -

3 MR. LEWIN: Entitled him to.

4 JUSTICE SCALIA: -- required that these --
5 that these companies remain in business. And I guess we
6 did scrutinize that. What did we conclude, that that
7 was --

8 MR. LEWIN: I think the Court concluded that
9 no, that did not justify the exercise of the President's
10 power even though it was --

11 JUSTICE KENNEDY: But that wasn't a case --
12 that wasn't a case in which the Congress had said you
13 may not seize mills. And that's what your case is. So
14 there's a difference.

15 MR. LEWIN: Well, but that's -- that's an a
16 fortiori situation, Justice Kennedy. If if Congress
17 didn't even say you may not seize steel mills, but
18 simply because they didn't give the President
19 affirmatively the authority --

20 JUSTICE KENNEDY: It is if you assume that
21 the statute is valid.

22 MR. LEWIN: Well, but the statute in this
23 case -- again I come back to the fact that the statute
24 in this case is a passport statute.

25 JUSTICE KENNEDY: If the statute is invalid

1 we are in category one.

2 MR. LEWIN: Yes.

3 JUSTICE KENNEDY: Or two.

4 MR. LEWIN: But the statute in this case is
5 on its face a passport statute. There's no reason --

6 JUSTICE KAGAN: But it's a passport statute
7 that --

8 MR. LEWIN: It's an identification.

9 JUSTICE KAGAN: I'm sorry. It's a passport
10 statute that seems to have nothing to do with the
11 immigration functions that passport statutes usually
12 serve. It seems to have everything to do with
13 Congress's declaration of a foreign policy, as opposed
14 to Congress's exercise of power relating to immigration
15 control. So convince me that I am wrong on that.

16 MR. LEWIN: I think you are wrong on that,
17 Justice, and let me explain why. Let me explain why.
18 Because it is clear from the history of this line on the
19 passport that it is purely an identification of the
20 individual; it is not an exercise of any foreign policy.
21 Indeed, the passport statute itself says that a passport
22 is "any travel document issued by competent authority
23 showing the bearer's origin, identity, and nationality."
24 And in this case, the history of this line on the
25 passport demonstrates I think conclusively, and the

1 State Department has acknowledged it, that it is purely
2 a means of identification. And what Congress has said
3 is, with regard to these citizens we will permit them to
4 identify themselves, like Congress permitted the
5 Taiwanese to identify themselves.

6 JUSTICE ALITO: Are you suggesting Congress
7 enacted this because they thought that if these
8 individuals' passports simply said "Jerusalem" there
9 would be an identification problem?

10 MR. LEWIN: Not be -- Justice Alito, it is
11 not because there would be an identification problem.
12 But there was -- Congress recognized that with regard to
13 the 50,000 people who have a passport that says
14 "Jerusalem," they are being denied a certain sense of
15 self-respect that they feel they should be able to have
16 in terms of their own identification.

17 This is not a statute that is designed to
18 create some political brouhaha or make a foreign policy
19 statement. It's a statute that frankly fits in with
20 what the State Department does in accommodating to
21 individual passport holders. The State Department says
22 if you are a Palestinian or an Arab and you are born in
23 Haifa and you don't like seeing "Israel" in your
24 passport, we will allow you to eliminate "Israel" from
25 your passport. And all that Congress has said is --

1 JUSTICE KAGAN: That might be true, Mr.
2 Lewin. I think you would have a better argument if this
3 statute said if you were born in Jerusalem you can pick
4 anything you want in your passport; you can pick
5 Jerusalem, you can pick Israel or you can pick
6 Palestine. But the statute in fact doesn't say that.
7 It says you can pick Israel.

8 So why isn't that a statement of foreign
9 policy as to recognition that Jerusalem is the capital
10 of Israel as opposed to what you are characterizing it
11 as, which is a sort of freedom of sort of choice
12 provision?

13 MR. LEWIN: I think that what you said the
14 statute doesn't say, Justice Kagan, is exactly what the
15 statute does say. The statute does say that the
16 individual passport holder can choose to say Israel or
17 can keep it as Jerusalem, and if he's born before 1948
18 he can say Palestine. So it is an individual choice.

19 JUSTICE KAGAN: Well, you have to be very
20 old to say Palestine.

21 MR. LEWIN: Pardon? Pardon?

22 JUSTICE GINSBURG: Not all that old.

23 (Laughter.)

24 MR. LEWIN: It's -- I guess it's a
25 reflection on my own seniority that -- it's my

1 generation that fits into that.

2 But -- but the fact is exactly; our point is
3 that that's all that the statute does. The statute is a
4 means of permitting self-identification by an American
5 citizen who says: My birth in Jerusalem, indeed in West
6 Jerusalem, which has always been recognized as a part of
7 Israel, I want to call -- I want my passport to say
8 "Israel."

9 CHIEF JUSTICE ROBERTS: But it's recognizing
10 that principle only with respect to a particular
11 jurisdiction. An American citizen born in Northern
12 Ireland doesn't have this option, because he thinks it's
13 a part of Ireland.

14 MR. LEWIN: No, but an American citizen born
15 in Taiwan apparently does have that option, even the
16 though the United States says we don't recognize Taiwan
17 as an independent country.

18 CHIEF JUSTICE ROBERTS: And your -- and your
19 friend on behalf of the United States says that's
20 because of a State Department judgment that in one
21 situation it's significant, in the other it's not.

22 MR. LEWIN: Well, no, it's not just because.
23 It's because what happens is there is a recognition in
24 both cases that it is a personal identification choice
25 with regard to what goes on the passport. Sure, in that

1 case the State Department didn't take it to litigation,
2 although I submit that had they chosen to litigate that
3 case they would have a stronger position than they have
4 in this case.

5 JUSTICE SCALIA: But a personal
6 identification choice can also have significant foreign
7 policy implications, can it not? Is -- is that an
8 either-or situation?

9 What the State Department is saying is to
10 allow this particular personal identification choice may
11 antagonize some foreign nations that we don't want to
12 antagonize.

13 What if they gave them the choice of saying
14 "Israel, the only democracy in the Middle East." Okay,
15 that's their choice. They can have that on their
16 passport. Would that be okay?

17 MR. LEWIN: I have to say that, given this
18 Court's view about Congress's power with regard to
19 A-passports -- and again, I go back to the fact that in
20 Zemel and Rusk, in Haig and Agee, in Kent v. Dulles, in
21 all these passport cases this Court said we look to see
22 whether what the President does is authorized by
23 Congress, whether implicitly or otherwise. So that, I
24 submit, that with regard to passports you need the
25 congressional authority, whether it's implicit or

1 express.

2 And with regard to your question,
3 Justice Scalia, yes, Congress could in its exercise of
4 its passport authority say: here is what the passport
5 has to say. It would be a foolish statute. But this
6 Court has said, and I think you, Justice Scalia, have
7 said it many times, it's not the Court's job to
8 determine whether Congress is foolish or not. If
9 Congress decides that, look, somebody born in Israel, a
10 passport should say "Israel, the only democracy in the
11 Middle East," Congress can say that. Congress has
12 passport authority. And this --

13 JUSTICE GINSBURG: Well, what is --

14 MR. LEWIN: -- and this has to do with the
15 contents of the passport.

16 JUSTICE GINSBURG: Mr. Lewin, what you've
17 argued is that you are skipping over the question that
18 the D.C. Circuit decided. I take it your view is it's
19 not a political question, so the Court should resolve
20 the merits?

21 MR. LEWIN: Our view is it's not a political
22 question because it is like many other questions that
23 affect foreign policy. And the Court said in Baker and
24 Carr, not every decision that touches on foreign affairs
25 or foreign policy is a political question that can't be

1 determined. It -- it -- arguably, according to the
2 government, this affects foreign policy. We say it is
3 simply Congress having passed a statute which either is
4 unconstitutional -- we say it is constitutional --
5 either is unconstitutional or the Court should simply
6 enforce it, like in the Japan Whaling case. In the
7 Japan Whaling case, this Court rejected the claim that
8 the outcome of a determination by the Court might very
9 well affect foreign relations and said it's not a
10 political question.

11 I would like to reserve the remaining time
12 for rebuttal. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Lewin.

15 General Verrilli.

16 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

17 ON BEHALF OF THE RESPONDENT

18 GEN. VERRILLI: Mr. Chief Justice and may it
19 please the Court:

20 The Executive has determined that the
21 passports it issues should not identify Israel as the
22 place of birth for persons born in Jerusalem.
23 Petitioner seeks relief under section 214(d) that would
24 countermand that executive judgment. But under the
25 Constitution that is an exercise of the Executive's

1 exclusive recognition power. The Constitution commits
2 that power exclusively to the Executive and neither a
3 court nor the Congress can override that judgment.

4 CHIEF JUSTICE ROBERTS: Your friend --

5 JUSTICE GINSBURG: Well, the --

6 CHIEF JUSTICE ROBERTS: Your friend
7 documented contrary history at some length in his reply
8 brief, where from the beginning at least as he says
9 through the McKinley Administration, the two branches
10 acted as if they had co-equal authority.

11 GEN. VERRILLI: Mr. Chief Justice, if I
12 might spend a minute or two on that history, because I
13 don't think it shows what my friend suggests that it
14 does.

15 Before getting to the starting point of that
16 story, which I think is the Monroe Administration, I
17 would like to point out that in the Washington
18 Administration the President confronted the question
19 with respect to whether to recognize the revolutionary
20 government of France. And President Washington
21 consulted with his cabinet, and of course his cabinet
22 included Jefferson and Madison and Hamilton and Jay.
23 And they decided that this was a power that was
24 exclusive to the President to such an extent that they
25 didn't even need to send a message to the Congress that

1 they were going to recognize the new revolutionary
2 government in France.

3 Now, the second fact I think is critical as
4 a matter of history is that there is not a single piece
5 of legislation that has passed both houses of Congress
6 and come to the President purporting to recognize a
7 foreign nation or territorial boundary of a foreign
8 nation.

9 JUSTICE ALITO: Has there ever been an
10 instance in which the President has recognized a foreign
11 government over Congress's sustained objection?

12 GEN. VERRILLI: I don't -- I can't think of
13 an instance of Congress's sustained objection. I think
14 probably the closest we would come is the revolutionary
15 government of Mexico, which President Wilson first
16 recognized on a de facto basis in 1915 and a de jure
17 basis in 1917. Congress indicated displeasure with
18 that. President Wilson sent his message to Congress
19 saying that this is an exclusive executive function.
20 Congress backed down.

21 JUSTICE BREYER: What would have been the
22 reasons that -- because your friend says that this is an
23 a fortiori case from everything, because all of these
24 words -- every time the word "exclusive power" has
25 appeared in any source -- I think that's what you are

1 saying -- it is meant that the President can act without
2 supporting authority from Congress. But there never has
3 been a case or a suggestion that the President can act
4 where Congress has legislated to the contrary. Now, I
5 think that's the -- that's the argument. And so what --
6 I would like to hear what you have to say about that
7 argument.

8 GEN. VERRILLI: Yes. Yes, I will answer
9 that question directly.

10 JUSTICE BREYER: Uh-huh.

11 GEN. VERRILLI: It is true that the Court
12 has never before, with respect to the recognition power,
13 confronted the question of whether the President is free
14 to act in a manner different than a congressional
15 command because Congress has never purported to issue a
16 command. That does not mean, however, that my friend is
17 correct that this is a situation in which Congress has
18 the authority to countermand or direct the decision of
19 the President.

20 This is, we submit -- even if one thinks
21 about this as a Youngstown category three case, this is
22 a Youngstown category three case of the kind that
23 Justice Jackson identified in footnote 4, where he cited
24 *Myers v. The United States*. The kind of case in
25 category three of Youngstown, in which the President's

1 judgment can prevail even over a contrary judgment of
2 Congress, is a case in which the President has exclusive
3 authority.

4 JUSTICE BREYER: All right now, but my
5 question is what leads you to that conclusion.

6 GEN. VERRILLI: Well, let me --

7 JUSTICE BREYER: There are very, very few
8 cases I can ever think of where -- where the
9 President -- where the Court has said the President can
10 act contrary to a statute. And so the point of my
11 question was to get you to talk about why, even though
12 this is a fortiori.

13 GEN. VERRILLI: So, I do think, if I
14 could -- I think it would be helpful in answering your
15 question, Justice Breyer, if I could return to the Chief
16 Justice's question about history. Moving beyond that
17 initial recognition by Washington that this is an
18 exclusive power, which I think is quite significant,
19 when we get to the Monroe Administration there is a
20 fight between Clay and Monroe about whether the
21 President has exclusive authority to recognize the new
22 South American republics.

23 Now, a couple of points there. I think the
24 -- what -- the only thing that one could point to as an
25 action by the Congress that even implicates the

1 recognition power is one house of Congress passed an
2 appropriations measure for an ambassador. What the --
3 the history treatise, the global treatise that my friend
4 cites says on page 133, the very page that he cites in
5 his reply brief, is that Clay's effort to contest the
6 President's exclusive authority came to a, quote,
7 "inglorious end, unquote.

8 He then goes on to say -- my friend goes on
9 to say: Well, but a year later when President Monroe
10 sought to actually recognize these South American
11 republics he asked -- he asked the Congress to join him
12 in it. What he asked Congress for was an appropriation
13 for an ambassador. But it was not the sending of an
14 ambassador to the Republic of Columbia that was the
15 recognition. It was when President Monroe received an
16 ambassador from Columbia that constituted the
17 recognition, and that was an exclusive act that he
18 undertook without any consultation with Congress. Now
19 --

20 JUSTICE GINSBURG: The two examples you are
21 given in the brief, one of Texas, where Petitioner says
22 there was a case where Congress went for -- Congress
23 recognized and the President acquiesced, and the same
24 thing with Taiwan; it was a statute and the President
25 implemented it. So Congress thought it had the

1 authority, the recognition authority, in those two
2 measures and the President acquiesced.

3 GEN. VERRILLI: I would like to address
4 Texas because I do think that's probably the most
5 significant example that my friend's identified. But
6 even there, I think if one works through the history
7 we'll see that's it's an exclusive executive power.

8 President Jackson, in his first letter in
9 1836 to the Congress says essentially: I hear you; you
10 think you we should recognize Texas. And then he says:
11 It's an open question as far as I am concerned whether
12 there is exclusive authority or not. It's not been
13 something that the legislature has ever studied, but as
14 a matter of expediency, he says, we don't need to
15 resolve that question, because I want to work with you.
16 He then goes on to caution the Congress to not move too
17 quickly for fear of precipitating war with Mexico, which
18 I think, Justice Breyer, I will try to return to a
19 functional analysis later, and I think it's an important
20 point.

21 Then -- I think what is important, Justice
22 Ginsburg, is that what Congress did next, as to pass two
23 appropriations measures, one in the House, one in the
24 Senate. Each of those measures appropriates funds for
25 an emissary to the Republic of Texas, but each includes

1 language that says: At such time that the President
2 determines that it's appropriate to do so.

3 If one looks at the page in the
4 Congressional Globe that my friend cites, one will see
5 that that language was added because as originally
6 introduced the appropriations riders were objected to by
7 members of the Congress on the ground that they
8 infringed on the President's exclusive recognition
9 authority.

10 CHIEF JUSTICE ROBERTS: Counsel, if I could
11 just stop you and just have you address the political
12 question doctrine.

13 GEN. VERRILLI: Certainly.

14 CHIEF JUSTICE ROBERTS: You say this is
15 exclusively committed to the President and therefore it
16 is a non-justiciable political question. How is that
17 different from saying, it's our job to decide cases, it
18 is justiciable, and then you can argue that the answer
19 of that analysis is that it is exclusively committed to
20 the President? I don't understand why labeling it a
21 political question advances the analysis much.

22 GEN. VERRILLI: Well, I think we agree, Mr.
23 Chief Justice, that there isn't a very great deal of
24 difference. We acknowledge that in conducting the
25 political question analysis that it is for the Court do

1 decide whether there is a textual commitment to the
2 executive; it is for the Court to decide the scope. We
3 think that's what *Nixon v. The United States* says; it's
4 what *Powell v. McCormack* says; and that in answering
5 those questions we think that the Court will have gone a
6 very long way to determining the question of the
7 constitution --

8 JUSTICE GINSBURG: Why not all the way? I
9 mean, if the Court decides that the Constitution commits
10 this authority exclusively to the President, then it's
11 all over. That's the merits of the case: Does the
12 President have this authority? So the political
13 question label seems to be kind of a -- a substitute
14 because if there is a textual commission, commitment to
15 the President, that's the end of the case.

16 GEN. VERRILLI: Well, the -- I do think that
17 with respect to the first *Baker v. Carr* factor, textual
18 commitment is a factor that the Court has indicated is
19 one that can lead to the conclusion that it's a
20 political question.

21 I do think that the Court has to go through
22 the analysis. And so at the end of the day, there may
23 not be very much of a difference -- -

24 JUSTICE ALITO: Well, doesn't it depend on
25 what the question is. In order to decide whether it's a

1 political question, you have to identify the question.

2 Now, if the question is whether the President has

3 exclusive authority with respect to the formal

4 recognition of a foreign country that might be one

5 thing. But what if the question is whether the

6 President has exclusive jurisdiction with respect -- has

7 plenary authority, unreviewable authority, with respect

8 to anything that the President thinks has a bearing on

9 the question of recognition.

10 Now, if that's the question, is that

11 committed exclusively to the President?

12 GEN. VERRILLI: No, Justice Alito, we don't

13 -- we think *Powell v. McCormick* and *Nixon* say that the

14 question of -- not just the question of commitment, but

15 also the question of scope, are questions for the Court

16 to decide.

17 Now, we do think, with respect to the

18 question here that, even though it's for the Court to

19 decide, it's for the Court to decide with a very

20 significant measure of deference, because when -- the

21 decision by the executive with respect to how it's going

22 to handle the status of Jerusalem in passports is a very

23 sensitive and delicate matter. This position was

24 arrived at after very careful thought and it is enforced

25 very carefully. And I think from that should come the

1 lesson that this judge -- and the reason is because the
2 executive believes that the statement on the passport
3 has to be understood as a manifestation of the
4 President's exercise of the recognition power.

5 JUSTICE KAGAN: Suppose, General Verrilli,
6 suppose that this statute, there was a -- the section
7 that's there now and then there was another section, and
8 the section said: "The recording of Israel as a place
9 of birth on a passport shall not constitute recognition
10 of Israel's sovereignty over Jerusalem."

11 Would that be constitutional?

12 GEN. VERRILLI: I don't think it would
13 change the analysis, Justice Kagan. I -- I think -- of
14 course, that is not this statute, which has a title
15 which says "United States policy with respect to
16 Jerusalem as the capital of Israel." But --

17 JUSTICE KAGAN: No, my statute has a title
18 which says "Identification of Persons Born in
19 Jerusalem."

20 GEN. VERRILLI: I still think that would be
21 within the scope of the Executive's power to decide
22 because the content of the passport insofar as the
23 Executive believes that it constitutes an expression
24 of -- of, an incident of recognition, is a judgment that
25 the Executive makes.

1 Now, the Court can review that, but the
2 Court's review of it should be done with a significant
3 measure of deference as the Court suggested in *Regan v.*
4 *Wald* --

5 JUSTICE SOTOMAYOR: General, what is --

6 JUSTICE KENNEDY: That seems to me different
7 than the rationale of the D.C. Circuit. It seems to me
8 you are not defending the rationale of the D.C.
9 Circuit --

10 GEN. VERRILLI: No, we --

11 JUSTICE KENNEDY: -- that there's no
12 jurisdiction. And -- you know, it's always awkward for
13 us to tell counsel what's in their best interest, but --
14 but it does, it does seem to me that your position would
15 be much stronger if you said there is jurisdiction and
16 the President wins.

17 GEN. VERRILLI: Well, we think -- we do
18 think that if there is jurisdiction, the President wins.
19 But we do think that the D.C. Circuit acted
20 appropriately in finding that --

21 JUSTICE KENNEDY: Because if this -- if this
22 rationale remains the law and is the law, then you have
23 the specter of constant legislative determinations that
24 are not clearly -- not clearly invalid. And it seems to
25 me that's, again with all due respect, not in the best

1 interest of the ultimate argument you are making.

2 GEN. VERRILLI: Well, we appreciate that,
3 Justice Kennedy. We do think that in resolving a
4 political question -- in conducting the political
5 question analysis, the questions that the Court would
6 need to decide under Nixon and Powell would go a very
7 long way to clarifying that problem.

8 CHIEF JUSTICE ROBERTS: What if --

9 JUSTICE SOTOMAYOR: General --

10 CHIEF JUSTICE ROBERTS: What if Congress's
11 statute said: What you must put on the passport, if
12 requested, is "Israel," parentheses, "Disputed," close
13 parentheses, which would seem to take care of your
14 objection that people are going to look at this and draw
15 a false conclusion.

16 GEN. VERRILLI: I don't think that changes
17 the analysis, Mr. Chief Justice, because I think that
18 the -- to the -- because it would -- that would be again
19 Congress seeking to direct a judgment of the --

20 CHIEF JUSTICE ROBERTS: It is the position
21 of the administration, isn't it, that the status of
22 Jerusalem is disputed?

23 GEN. VERRILLI: That's correct, Mr. Chief
24 Justice, but it -- what the United States says about
25 that in official communications -- and remember, a

1 passport is not a communication by the passport holder.
2 It's an official United States document that
3 communicates the position of the United States.

4 CHIEF JUSTICE ROBERTS: So what if Congress
5 says in the place that you have it: This person has the
6 choice of whether or not to put Jerusalem or Israel.
7 This doesn't affect whether the United States recognizes
8 Jerusalem as part of Israel or not; it's just his
9 choice. Same problem?

10 GEN. VERRILLI: Same problem, Mr. Chief
11 Justice. This is --

12 CHIEF JUSTICE ROBERTS: Really? I thought
13 your argument was that someone's going to look at that
14 and say: That offends me, that you are calling this
15 part of Israel. That was the foreign policy
16 significance. And I tried to give you a hypothetical in
17 which nobody could reasonably draw that conclusion, and
18 you say still, same thing.

19 GEN. VERRILLI: I do think that this is an
20 area in which the executive's got to make the judgment
21 because it's of paramount importance that the nation
22 speak with one voice.

23 JUSTICE GINSBURG: Then, Mister -- General
24 Verrilli, then you are taking the position that this is
25 not a shared authority; it's an exclusive authority;

1 that there is no role for Congress. Am I right? Or is
2 there some role in recognition for Congress?

3 GEN. VERRILLI: Our position, Justice
4 Ginsburg, is that the recognition power is exclusive to
5 the President.

6 JUSTICE SCALIA: What if -- what if the
7 recognition of a breakaway province of a foreign country
8 by the United States will clearly provoke a war with
9 that country. Would Congress have the power to decree
10 that the President shall not recognize that breakaway
11 province, knowing -- knowing that if he does recognize
12 it, that country will declare war on the United States?

13 GEN. VERRILLI: I think, Justice Scalia,
14 that's a situation in which the President would exercise
15 that recognition power very carefully --

16 JUSTICE SCALIA: No, no. We have a foolish
17 President.

18 {Laughter.}

19 JUSTICE SCALIA: Contrary to our entire
20 history, we have a --

21 (Laughter.)

22 GEN. VERRILLI: I think -- although I
23 don't -- I just don't think that in a situation like
24 that, the President would exercise a recognition power,
25 but if -- but if the President did, it's the President's

1 judgment to make.

2 And I -- Justice Breyer, if I could get back
3 to your question, the --

4 JUSTICE SCALIA: Please stay on this. I
5 am -- I am willing -- our -- our cases say repeatedly
6 that the President is the sole instrument of the United
7 States for the conduct of foreign policy, but to be the
8 sole instrument and to determine the foreign policy are
9 two quite different things. To say he's the sole
10 instrument simply means that congressmen traveling
11 abroad, or globetrotting ex-presidents, nobody except
12 the President of the United States pronounces the
13 foreign policy. But it doesn't necessarily mean that
14 the President determines everything in foreign policy.

15 He's the instrument, but there is certainly
16 room in -- in those many cases for saying that Congress
17 can say what the -- what it's -- what the country's
18 instrument is supposed to do.

19 GEN. VERRILLI: I -- I think with respect to
20 the question of recognition, Justice Scalia, that it is
21 a power that rests with the executive. And I think in
22 addition to the history -- in that we do now in 220-plus
23 years in our Constitution, do not have a single example
24 of Congress actually exercising the power -- and I think
25 in addition to the history, there are very good

1 functional reasons why that is so.

2 And I think, Justice Breyer, in answering
3 your earlier question, I think those are significant.
4 The exercise of the recognition power depends, we think,
5 on three things that make it clear that it needs to be
6 exclusive. The first is timing; the second is
7 expertise; and the third is a need for secrecy.

8 Timing --

9 JUSTICE KENNEDY: I didn't hear the third.

10 GEN. VERRILLI: The need for secrecy.

11 Timing is, I think the Israel example shows,
12 is of critical importance. But it's not just speed. Of
13 course, Congress can't act with the dispatch needed in a
14 situation like the recognition of Israel. But the --
15 but apart from that, recognition -- a recognition that
16 occurs too soon could send events in the direction that
17 could be very disadvantageous to our foreign policy. A
18 recognition that comes too late could -- could squander
19 an important opportunity in the national interest in the
20 foreign policy realm.

21 JUSTICE KAGAN: General Verrilli, is the
22 textural basis for your argument that the President has
23 exclusive power here? Is it the receipt of ambassadors
24 clause alone, or is it something else? Because I was
25 frankly a little bit surprised that your brief put so

1 much weight on that receipt of ambassadors clause, which
2 arguably was meant to give the President a purely
3 ministerial function. And so literally, on any other
4 power that the President has.

5 GEN. VERRILLI: So -- here's our position on
6 that, Justice Kagan. We do think that the reception
7 clause is the source of the recognition power. Hamilton
8 identified it as the source of the recognition power in
9 the Washington administration. I think it's now
10 understood that it's hornbook law that that's the
11 textual source -- but to the extent that --

12 JUSTICE SCALIA: Well, it's the best there
13 is. I mean, if you've got to cast about for something,
14 I suppose -- I don't know what else you'd -- you'd land
15 upon.

16 GEN. VERRILLI: It is there.

17 JUSTICE SCALIA: Well, it is there.

18 GEN. VERRILLI: And I would say in
19 addition -- I would say in addition, to the extent that
20 there is a question, we do think, as I think we
21 indicated in our brief, that -- that one can see this
22 power as part of what the Court in Garamendi described
23 as the vast share of responsibility that the
24 Constitution assigns to the executive. Now, we don't
25 think all of that shared responsibility is exclusive to

1 the Executive -- but we think this responsibility is
2 exclusive --

3 JUSTICE KAGAN: So if that provision were
4 not in the Constitution, would you be making the same
5 argument you are now?

6 GEN. VERRILLI: If the reception clause were
7 not in the Constitution -- but we had the same history
8 that we have now and the same functional considerations
9 about the need for it being in the control of the
10 executive, yes, we would.

11 JUSTICE ALITO: There are many things that
12 Congress could do to frustrate the President's decision
13 to recognize another country. Now, would you say all of
14 those are unconstitutional? They all infringe the
15 President's exclusive recognition authority?

16 Suppose the President decides to recognize a
17 country and Congress refuses to appropriate any money
18 for an embassy there, or refuses to confirm any U.S.
19 ambassador to that country. Those presumably would not
20 be unconstitutional, would they?

21 GEN. VERRILLI: The -- I think that there
22 would be a difference between -- I -- I think that --
23 that Congress has authority over appropriations.
24 Congress has authority to appoint ambassadors. It's
25 entitled to exercise that authority, and it's entitled

1 to exercise that authority even if it's intentioned with
2 the President's recognition decision.

3 It is the position of the executive though
4 that there could be circumstances in which Congress
5 could try to exercise its appropriations authority in a
6 way that would preclude the executive from exercising
7 its -- its recognition power, and that -- the executive
8 would -- would in some circumstances believe that it had
9 the authority to move ahead despite those actions by
10 Congress.

11 But of course, this is not a situation in
12 which Congress has passed a sense of the Congress
13 resolution about what it thinks. It's not a situation
14 in which Congress has exercised attaching conditions to
15 its spending power about what private parties do. This
16 is an effort by Congress to regulate the content of a
17 passport, which, as the Court recognized in *Haig v.*
18 *Agee*, is a core instrument of diplomatic communication.

19 JUSTICE ALITO: Do -- do you think that's an
20 exclusive power, to -- to determine of the contents of
21 passports? Hasn't Congress exercised that authority for
22 a long time?

23 GEN. VERRILLI: We -- we don't think that
24 the -- the entire content of passports is an exclusive
25 power. I would -- and I will explain, Justice Alito,

1 where we think the line is. But before doing so, I want
2 to push back a little bit on the notion that Congress
3 has for a long time exercised authority over the content
4 of passport the.

5 The first Passport Act was in 1856. What
6 this Court said in *Haig v. Agee* was that the enactment
7 of that statute merely confirmed a power that everyone
8 understood to be inherent in the executive. That
9 statute did not purport to regulate the content of
10 passports. It in fact said that passports shall be
11 issued under such rules as the President shall
12 proscribe. And -- and in *Haig*, that was that language I
13 think that led the Court to conclude that this was a
14 confirmation of the executive's authority, and an action
15 in aid of that authority. Now --

16 JUSTICE BREYER: I just want -- I don't want
17 the time to elapse. You can finish that if you'd like.
18 I'd just like somewhere a few words about the political
19 question, which you don't believe in -- from reading
20 your brief. I would say you don't believe in it much.
21 And my question on the political question for either of
22 you is this: that -- that this is an area of foreign
23 affairs. It's an area of -- of, you know, recognition.
24 We know that.

25 Never has this Court or anyone else held

1 that Congress can go ahead in this area over a law
2 passed by Congress. But it is passports, which both
3 regulate. And our real problem is these are words that
4 are officially said and they are detailed words, and
5 those words may really disrupt coherent foreign policy.
6 Viewed that way, there are billions of words that might
7 have the same effect. And do we know that these words
8 will and some other words won't? No, judges don't know
9 that.

10 And therefore, when you get into this area,
11 the best thing to do is avoid multifarious
12 pronouncements by various departments of government on
13 one question, do not respect the views of other
14 branches, and judges, stay out of it. Let them work it
15 out by themselves.

16 I just want a word from either you and
17 really Mr. Lewin on -- on that.

18 GEN. VERRILLI: Well, we do think --
19 that's -- that's what -- we think that the appropriate
20 inquiry for political question purposes is into the
21 relief that the Petitioner is seeking. And if the
22 relief the Petitioner is seeking would invade the kinds
23 of judgments that the Constitution commits exclusively
24 to the executive, and the reason it commits these kind
25 of judgments exclusively to the executive is because

1 this is a situation in which multifarious voices are
2 inimical to the national interest.

3 JUSTICE GINSBURG: But that is -- that
4 presents a merits determination. The whole question is
5 who has the authority. And whatever label you put on
6 it, if you decide that the President has, as you just
7 said, the exclusive authority, that's the end of the
8 matter. It's -- it's not leaving it -- it is not
9 leaving it, as Justice Breyer said, to the political
10 branches to fight it out between them. It is saying the
11 President has the exclusive authority.

12 GEN. VERRILLI: Well, I -- I think in --
13 in -- let me try to put it this way, Justice Ginsburg:
14 in the absence of section 214, I think it would be clear
15 from Pink and Belmont that this -- that the judgment on
16 recognition is exclusively committed to the executive,
17 and it would be a political question, if a party came in
18 and said I want my passport to say something different
19 about Jerusalem than it says --

20 JUSTICE SOTOMAYOR: General, the -- the
21 tension that I see here, and I think it's what
22 Justice Breyer's getting at, is the label's important,
23 because if we call this a political question and don't
24 address the merits, the outcome is that the President is
25 saying that he's entitled to ignore the Congress. I

1 don't know what kind of message that sends, but it's a
2 little unsettling that a Court charged with enforcing
3 the laws passed by Congress are basically saying we are
4 not going to determine whether this law is
5 constitutional or unconstitutional. That's what your
6 definition of political question is becoming, and where
7 does that stop?

8 GEN. VERRILLI: Well, I --

9 JUSTICE SOTOMAYOR: In what situations?
10 Only in foreign policy do we decide not to --

11 GEN. VERRILLI: I think, Justice Sotomayor,
12 it's actually quite narrow, and the problem isn't a
13 significant one in the case of textual commitment,
14 because the Court does in reaching the conclusion, as
15 the D.C. Circuit did, that it's a political question the
16 Court does have to decide whether there is a textual
17 commitment to the executive here, so the Court would
18 resolve that question. The Court would resolve that
19 question of whether the conduct at issue here is within
20 the scope of that textual commitment. So the Court
21 would issue those rulings.

22 CHIEF JUSTICE ROBERTS: And what you told --

23 JUSTICE SOTOMAYOR: But that's not what the
24 D.C. Circuit did.

25 CHIEF JUSTICE ROBERTS: You told -- you told

1 Justice Kagan it didn't -- your position didn't depend
2 upon a textual commitment, that your position would be
3 the same if the receive ambassadors clause were not in
4 the Constitution.

5 GEN. VERRILLI: But I -- I didn't mean that
6 it wouldn't be a textual commitment. It would be -- it
7 would be a commitment that one would read as the
8 historical gloss on the vesting power, which is what --
9 Garamendi said.

10 CHIEF JUSTICE ROBERTS: That sounds to me
11 like not in the text.

12 GEN. VERRILLI: Well, I think it's the
13 historical gloss on the vesting power is -- functions as
14 has the equivalent of the specific textual commitment.
15 Of course, we do have the specific textual commitment
16 here, the --

17 JUSTICE SCALIA: This textual commitment
18 applies when somebody comes to the Court and asks for
19 the Court to make the decision. If the plaintiff here
20 had come in and -- without a congressional statute to
21 rely upon, and had said, it is -- it is wrong for the
22 State Department not to let me say Israel on my
23 passport, then we would say, you know, textually
24 committed to the executive.

25 But this is a different situation where you

1 have a -- a dispute between the two branches, and where
2 that happens, I find it hard to say, well, you know, we
3 can't get into it -- because why? Because it's
4 textually committed to one of the branches? It seems to
5 me we have to resolve that question.

6 GEN. VERRILLI: Well, as I said earlier, I
7 tried to say, we think that the -- the announcement of
8 the political question doctrine goes a very long way
9 towards answering that question, Justice Scalia. We do
10 think this could be seen as a case like Gilligan in
11 looking at the relief that the petitioner is seeking,
12 the plaintiff is seeking leads the Court to conclude
13 that this -- that -- that entertaining the claim would
14 embroil the Court in decisions that are supposed to be
15 made by another branch; and that in fact, I think you
16 can understand section 214(d) as precisely that, an
17 effort to try to draw the Court into this dispute
18 between Congress and the executive over whether
19 section -- over whether Jerusalem should be recognized
20 as part of Israel.

21 CHIEF JUSTICE ROBERTS: I will give you a
22 couple more minutes. If my colleagues have any
23 questions?

24 JUSTICE SCALIA: Yes, I -- I wanted to
25 follow up on that. Does -- does that mean you're

1 content to have this Court not say whether it's the
2 exclusive executive power or there's some congressional
3 participation? I mean, if we just abstain, if we just
4 say it's none of our business, it's none of our
5 business; let you two guys fight it out. That's not
6 what you are asking us to do, is it?

7 GEN. VERRILLI: That's correct, Justice
8 Scalia. It's what we are asking you to --

9 JUSTICE SCALIA: You are asking us to decide
10 the question that it is exclusively the presidential
11 power.

12 GEN. VERRILLI: Yes. That is correct.

13 JUSTICE SCALIA: That doesn't sound to me
14 like -- you know, like abstaining because it's a
15 political question. It seems to me like deciding the
16 case.

17 CHIEF JUSTICE ROBERTS: Do you want to
18 answer?

19 GEN. VERRILLI: We -- we do think that
20 the -- whether the Court is looking at it as a political
21 question or whether the Court is looking at it as a
22 judgment of the merits, the issue is textual commitment.
23 This is -- there is textual commitment. This is a
24 situation in which the country has to speak with one
25 voice, and the executive has determined what the country

1 should say.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Lewin, we will give you 6 minutes.

5 REBUTTAL ARGUMENT OF NATHAN LEWIN

6 ON BEHALF OF THE PETITIONER

7 MR. LEWIN: Thank you, Mr. Chief Justice.

8 Let me begin my rebuttal by echoing really
9 what Justice Alito said during my colleague's argument.
10 The question is whether anything that the President
11 thinks bears on recognition, it forecloses this Court or
12 any court from making that determination?

13 This is not in our view a recognition case.
14 This is a passport case. The question is, what goes on
15 the passport, and may somebody self-identify? This is
16 again, if one looks at the statute, if one even looks at
17 the Foreign Affairs Manual, a passport is not today
18 considered a diplomatic statement, it's an
19 identification of a person in order to enable him to
20 travel abroad.

21 Now again, let me also echo what the Chief
22 Justice and Justice Kagan asked during my colleague's
23 argument. If in fact the statute had said we don't say
24 Jerusalem is part of Israel, but you can identify
25 yourself as being in Israel, my -- we submit that result

1 can very easily be achieved and was achieved in the case
2 of Taiwan by a public statement by the executive.

3 Congress -- this law can be enacted; people
4 who were born in Jerusalem can have their passport say
5 either Jerusalem or Israel, that's their choice;
6 Congress hasn't said it has to say Israel, and then the
7 Department of State can issue as it did in the case of
8 Taiwan, a public statement saying, this is not official
9 American policy. Nobody's asking this Court to decide
10 what is official American policy. Nobody is asking the
11 Court to decide what as Justice Scalia said would happen
12 if there were no congressional statute. In that case it
13 would be a political question.

14 If my client had decided he wanted to have
15 his passport say Israel and he had no congressional
16 stature, and we brought the case to a court, the court
17 could say, no, you are asking us to decide what the
18 President should decide, what the Department of State
19 should decide.

20 But other than that, Congress has enacted
21 the law. The -- the fact is that with regard to this
22 legislation it is a statute which determines personal
23 choice with regard to a passport. The case can be a
24 vehicle -- this case can be a vehicle for an
25 authoritative clarification of the roles of Congress and

1 the President in conducting the nation's foreign
2 affairs. If so, then we submit Justice Jackson's
3 statement, which acknowledges that Congress has the
4 final word in the third category, is one that should
5 control. But there are narrower grounds for enforcing
6 section 214(d) that do not implicate separation of
7 powers issues.

8 It's a passport law; it's within Congress's
9 constitutional authority on the cases that have
10 recognized that the President may not deny or restrict
11 passports without the express or implied approval of
12 Congress. That doesn't require the recognition or
13 involve the recognition of foreign sovereigns. And the
14 State Department's justification for a policy that
15 Congress has disapproved does not -- withstand --
16 scrutiny. The Court merely has to look at the record in
17 this case in which the State Department has said, look,
18 we're concerned that there may be a misperception of
19 what this means -- a misperception. And it's
20 extraordinary that on the basis of the fact that there
21 is an alleged misperception, American citizens who have
22 been authorized by Congress to say -- identify
23 themselves on their passports as being born in Israel,
24 will now find that statute null and void.

25 JUSTICE SOTOMAYOR: Could you tell me --

1 let's assume that a dozen nations said this designation
2 on the passport as we view is an act of war. If the
3 United States is going to do this, we're going to view
4 it as an act of war. Would that then permit the
5 President to ignore Congress's --

6 MR. LEWIN: I think Congress has to weigh
7 that; and if Congress determines that in any event this
8 is what the passport should say, then that is
9 Congress --

10 JUSTICE SOTOMAYOR: So it's not the
11 misperception that's at issue.

12 MR. LEWIN: Well, in this case --

13 JUSTICE SOTOMAYOR: The misperception has
14 nothing to do with your argument.

15 MR. LEWIN: I -- I don't think that's true,
16 because --

17 JUSTICE SOTOMAYOR: You are going back to
18 Justice Scalia's point, which is what you're saying is
19 Congress dictates foreign policy in the end.

20 MR. LEWIN: In the end, if Congress
21 determines that what the President has said in this
22 context is wrong, yes. We live in a system under which
23 Congress passes the law, and the President has the
24 duty -- and I think Justice Scalia has said it, has the
25 duty to be the sole instrument of foreign policy. The

1 President speaks for the foreign policy that -- when
2 Congress authorizes him to do it, he may formulate it.
3 When Congress does not authorize him to do it, he may
4 formulate it. But when Congress disapproves of what he
5 does, then under Justice Jackson's test in the steel
6 seizure case, Congress prevails. The fact that there is
7 dictum in cases -- particularly Curtiss-Wright, which
8 has not come up in the course of the argument, but
9 justice Sutherland's opinion in the Curtiss-Wright case
10 in which he spoke broadly of the President as being the
11 sole organ of foreign policy, one has to say that the
12 Harvard professor Thomas Reed Powell, who used to tell
13 his students that just because Justice Sutherland writes
14 clearly, you must not suppose that he thinks clearly.

15 (Laughter.)

16 MR. LEWIN: And we submit that is really
17 what it's all about.

18 JUSTICE KENNEDY: I -- just -- just one
19 question on -- on Washington's recognition of
20 revolutionary France. You cite in the reply brief the
21 fact that the administration was simply following what
22 it deemed to be a dictate of international law. Do you
23 want us to infer from that that he was not exercising
24 real discretion there?

25 MR. LEWIN: Correct. The -- historians who

1 studied that have determined that he was just following
2 Mr. Vattel, who said you had have to recognize any
3 country that has de facto control, and therefore, since
4 the French revolutionists were in de facto control of
5 the French Government, Washington had no choice. He was
6 not exercising any kind of discretion.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:06 a.m., the case in the
10 above-entitled matter was submitted.)

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